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Summary of Argument.

The Illinois Supreme Court passed on a question of fact as to whether or not the transaction between Dorothea W. Huszagh and Cardwell constituted a valid agreement, and decided that it did. Such agreement having been executed more than four months prior to bankruptcy, no federal question is involved.

The availability of bankrupt's trust income to his Trustee in Bankruptcy is determined by the law of the situs of the trust. The interpretation of property rights rests in the decision of the State courts and those decisions are controlling.

Where the decisions of a State court might have been either on a State ground or a Federal ground and the State ground is sufficient to sustain the judgment, the Supreme Court will not grant review even if the Federal law is erroneously interpreted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 823

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,

Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,

Respondents.

BRIEF OF FRED J. WEGG, AS SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED, ONE OF THE RESPONDENTS, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at Page 526. No opinion of the Illinois Supreme Court is attached to the petition. The substitution of the Appellate Court opinion, as an appendix to the petition is improper.

STATEMENT MAKING AGAINST JURISDICTION.

The case at bar was decided by the Illinois Supreme Court on a mixed question of fact and law, as to which it determined that the decree entered in the creditor's bill proceeding was in fact and in law a consent decree; the same having been fully implemented by the parties thereto, the matter was *res adjudicata* more than four months prior to bankruptcy and under the Illinois law no party thereto can have said decree vacated or set aside.

Such proceedings having been concluded, and the interest of Dorothea Huszagh conveyed by the consent decree and the Master's sale and assignment more than four months prior to the intervention of bankruptcy, and no claim of fraud or concealment being charged, the Trustee in Bankruptcy cannot be heard with respect to such transfer.

No federal question of law was necessarily involved in the hearing and determination of that issue.

No substantial or important question of law is presented by this record.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This respondent adds the following to correct and complete the petitioner's "Summary and Short Statement of the Matter Involved."

(a) The decree in the original creditor's bill (Rec. 17-23) proceeding adjudicated the rights of this respondent, Fred J. Wegg, as Trustee under the Will of Frederick H. Wickett, Deceased, and Dorothea Huszagh, one of the beneficiaries under said trust, with respect to important matters of accounting between them;

(b) Said decree found that Dorothea Huszagh was indebted to Wegg, Trustee, in the sum of approximately fifty thousand dollars ($50,000.00) as security for which he had the right to withhold distribution of income from said trust which might otherwise be due the said Dorothea Huszagh;

(c) Said decree was *res adjudicata* as to all parties thereto for more than four months prior to intervention of bankruptcy;

(d) Said petitioner, in his bill of review, recognized that rights in said property interest of Dorothea Huszagh may have attached by reason of the sale pursuant to the decree in the creditor's bill proceeding because he prayed, in the alternative (Rec. 31), for a money judgment against Cardwell in the event that Cardwell had conveyed or assigned interest acquired by him under said decree;

(e) Said petitioner alleged no facts entitling him to set aside the accounting between Dorothea Huszagh and Wegg, as trustee, had in said creditor's bill decree, and in no way attacked said accounting;

(f) Dorothea Huszagh in her counterclaim for review did not attack the accounting between her and Wegg, trustee, stated in said creditor's bill decree, and said accounting was *res adjudicata* between all of the parties to the creditor's suit, including Cardwell, more than ten months prior to bankruptcy.

(g) The Illinois Supreme Court (Rec. 154) held that it was not necessary for it to pass on the appeal of Wegg, trustee, from the Appellate Court regarding the accounting, because it ordered the decree of the trial court in the bill of review case affirmed.

(h) No question of fraud or collusion in connection with said creditor's bill proceeding was raised by the peti-

tioner. To the contrary, he denied in open court (Rec. 87) that any such question was presented;

(i) On the trial of the bill of review case the trial court heard evidence and found (Rec. 67) that Dorothea Huszagh, for a good and valuable consideration paid to her by Cardwell, agreed that she would not take any further action concerning the decree entered in the creditor's bill proceeding;

(j) The Supreme Court found (Rec. 153) as a *matter of fact* that there was such a valid agreement between Dorothea Huszagh and Cardwell; that Cardwell could not be placed in *status quo* and, therefore, Dorothea Huszagh is now estopped from litigating the questions involved in the bill of review case;

(k) Contrary to petitioner's statement, the Appellate Court did *not* sustain the title of the trustee under the Bankruptcy Act. In fact, it expressly refused to pass on this question. (Rec. 121.)

THE QUESTION PRESENTED.

The basic question presented to the Supreme Court of Illinois was whether or not Dorothea Huszagh could relitigate the effect of a decree as to which she had contracted away her rights for a valid consideration, and as to this, the Illinois Supreme Court determined that she was estopped. This matter having transpired more than four months prior to the filing of bankruptcy by her and there being no claim of fraud, the case left no federal question for determination.

PROPOSITIONS OF LAW.

If property is not in Bankruptcy Court's possession and a third person asserts a bona fide claim adverse to the Trustee in Bankruptcy, his rights must be determined in a plenary action.

Cline v. *Kaplan,* 323 U. S. 97.

In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

In such plenary action the interpretation of property rights (particularly when based upon the express terms of a State Statute) rests in the decisions of the State Courts and those decisions are controlling.

Erie v. *Thompson,* 304 U. S. page 64.

Potter v. *Couch,* 141 U. S. 296.

Where the decision of a State Court might have been either on a State ground or a Federal ground, and the State ground is sufficient to sustain the judgment, the Supreme Court will not grant review, even if the Federal law is erroneously interpreted.

Williams v. *Kaiser,* 323 U. S. 471; 65 S. Ct. 363 (367).

Radio Station WOW v. *Johnson;* 65 S. Ct. 1475, 1480; 89 Law Ed. Sup. Ct. Rep. 1397, 1402; 324 U. S. (Number 3 June 18, 1945 page III).

The Illinois Supreme Court passed on the question of fact as to whether or not the transaction between Dorothea Huszagh and Cardwell constituted a valid agreement, and gave effect to the same according to the laws of Illinois. Such agreement having been executed more than four months prior to bankruptcy and there being no claim of fraud, no Federal question is involved.

Blair v. *Brailey,* 221 Fed. 1 (Cir. Ct. 5th Cir. certiorari denied 238 U. S. 638).

The availability of bankrupt's trust income to his Trustee in Bankruptcy is to be determined by the law of the situs of the trust, and the Trustee must bring a plenary action authorized by state law against the party holding an adverse interest, which is the Trustee under the will.

Lockwood v. *Exchange Bank,* 190 U. S. 294.

ARGUMENT.

The petitioner proceeds on the premise that the interest of Dorothea Huszagh under the trust created by her father's will had not been changed or altered by any conduct of her own; as though there had been no intervention of the Cardwell proceeding, and her agreement with Cardwell concerning the transfer of her interest by her consent to the implementation of the decree of the Lake County Circuit Court.

Even assuming that there had been no intervention of creditor's bill litigation or voluntary agreements based on valid considerations, we submit that the federal courts would follow the decisions of the Illinois Supreme Court concerning the "property rights" which the Trustee in Bankruptcy might have in her interest in said trust.

The "property" sought to be reached by the Trustee in Bankruptcy was neither in the actual or constructive possession of the bankrupt nor in the actual or constructive possession of the Bankruptcy Court. *Blair* v. *Brailey*, 221 Fed. 1 (Cert. denied 238 U. S. 638). To bring this property into the Bankruptcy Court, where it could adjudicate the same under the Bankruptcy Act, it would have been necessary to institute litigation.

That litigation would have required the Trustee to go into a state court in a plenary action. (*Cline* v. *Kaplan*, 323 U. S. 97.) When he arrives in the state court he comes there endowed only with the specific rights and powers granted him by the state law and the Bankruptcy Act. Upon his arrival in a plenary action, he would have been faced with the obstacle set up by Section 49, Chapter

22 of the Illinois Revised Statutes, and the decisions of the State courts construing that Statute have consistently been upheld by the decisions of the United States Supreme Court. (*Potter* v. *Couch*, 141 U. S. 296; *Spindle* v. *Shreve*, 111 U. S. 542.) It has not even been a question of conflicting views, the Supreme Court of the United States properly giving effect to the decisions of the courts of last review of the State which is the situs of the property concerning the rights, limitations and immunities of such property.

It is specious for the petitioner to beg the question he seeks to argue, (his petition, page 19) that if the Illinois court's rule as to property not in the bankrupt's possession, and for which a plenary suit must be brought, is correct, then Section 70-C of the Bankruptcy Act imposes on the Trustee the duty to bring an action which could never succeed. Here the Court is presented with a *particular* type of case in which he cannot succeed, and it is only as to this specific situation that the Court is called upon to consider whether he can succeed and not whether any Trustee in any different case ever can succeed in plenary action.

It will not be contended that the United States Supreme Court will take jurisdiction of a cause to sit in judgment upon the correctness of decisions of the Supreme Court of Illinois with respect to property rights which had been conveyed or disposed of, either by voluntary action or by processes of law more than four months prior to the intervention of bankruptcy, and where, as in this case, no question of fraud is involved.

There has been no contrariety of opinion either by State or Federal decisions on the question of the limitations of Section 49 of our Chancery Act establishing a rule of property, and in these circumstances it is not to be presumed that what the legislature had established as a

rule of property creating immunities of trust interests of this nature when attacked by an individual creditor in his own right, would or should be waived or surrendered, and the immunity destroyed simply because the attack is made by a Trustee in Bankruptcy. The limitation and the protection of the statute is attached to the property and not to the nature or character of the particular plaintiff who seeks to reach that property in satisfaction of debt. Every basis of public policy, responsible in the first instance, for the enactment of this legislation must be considered as granting the property interest itself an immunity; and it must follow as a natural corollary that the matter of who may be the plaintiff in a given situation should be of no consequence. The Trustee in Bankruptcy is just as much subject to the public policy of the State of Illinois as an individual creditor. *Lockwood* v. *Exchange Bank,* 190 U. S. 294. To seek to make a federal question out of a matter which is peculiarly within the rights of a State, simply because the person raising the question is an officer under the Federal Bankruptcy Act, is to ask this Court to intervene in a sphere it has consistently refused to invade.

Petitioner seeks to convey the impression that the Illinois Supreme Court has gone counter to its previous decisions in similar cases and cites Illinois cases (petition, page 13) to an effect contrary to that given in this case—and complains that the Court ignored its previous decisions and thus attempts to establish that our Illinois courts are now dubious about the questions involved. The Supreme Court of Illinois properly ignored the cases cited by the petitioner because those cases had no applicability to the situation at hand. Heretofore, counsel for the petitioner vigorously urged them in his own briefs before that Court. In none of those cases was the Chancery Act involved or even raised; in one of the cases there was no trust; in the second, the trust had terminated; and in the third, the beneficiary of the trust brought his interest into the

Bankruptcy Court by scheduling the same in his own schedules.

The petition for certiorari attempts to induce the impression that in the State courts the only question raised concerned the title of the Trustee in Bankruptcy, and therefor it decided a Federal question. Quite to the contrary, the principal question raised was whether or not the creditor's bill proceedings was *res adjudicata;* whether or not, by reason of the contract between Cardwell and Dorothea Huszagh, the latter was estopped from raising the issue. All this having transpired more than four months before the intervention of bankruptcy, it was necessary for the court to make a decision on this issue *before* the court would have any occasion to consider any rights of the Trustee in Bankruptcy. For it must be obvious that if the Court decided the former questions it would have no occasion to even consider the latter question.

And this is precisely what the trial court, as well as the Illinois Supreme Court, did do. The memorandum opinion of the trial Court on the possible title of the Trustee was rendered on motions to strike and before the trial Court had heard any evidence; the final decree, (Rec. 66-67) from which review was sought, having decided that the previous matter was *res adjudicata,* was binding on Cardwell, Dorothea Huszagh and this respondent and found it unnecessary (and properly so) to pass on the latter question. For that reason, also, we respectfully submit, the Illinois Supreme Court, in affirming the Circuit Court on that question, did all that was necessary to finally conclude the litigation. Its discussion of the rights of the Trustee in Bankruptcy was merely dicta. It also may be noted that the final opinion rendered by the trial court in the bill of review case (Rec. 98) and the only notice of appeal filed by the trustee in bankruptcy (Rec. 68-69) showed that no question of bankruptcy law was decided by the

trial court in entering its decree (Rec. 66-67) dismissing for want of equity the trustee in bankruptcy's bill of review. The judgment of the Illinois Supreme Court affirming the decree of the trial court was not predicated on a broader basis than the decree of the trial court.

The Supreme Court will not review a decision of a state court until it affirmatively appears that a federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Supreme Court will not undertake to review it. *Williams* v. *Kaiser*, 323 U. S. 471, 65 S. Ct. 363 (367). And this is so even if the State Court has erroneously interpreted the Federal law. *Radio Station WOW* v. *Johnson*, 324 U. S. (No. 3 Opinion June 18, 1945) 65 S. Ct. 1475 (1480). *Herb* v. *Pitcairn*, 324 U. S. 117, 65 S. Ct. 459 (463).

The United States Supreme Court does not grant the writ of certiorari upon the mere ground that a part of the reasoning of the opinion of the lower court is doubtful although the result is correct. *Tyrrell* v. *District of Columbia*, 243 U. S. 1.

Petitioner seeks to make much of the fact that Dorothea Huszagh's interest was assignable by her and, therefore, it passed to her Trustee in Bankruptcy. The manifest inapplicability of the conclusion to the premise can be demonstrated as follows:

(a) Dorothea Huszagh, for a good and valuable consideration, and more than four months prior to the intervention of bankruptcy, sold her interest to a stranger. Obviously in such circumstances petitioner will not claim that the Trustee in Bankruptcy would have any right to this interest; or

(b) Dorothea Huszagh lost her interest in the trust by a judicial proceeding more than four months prior to the intervention of bankruptcy. Obviously in this situation also her Trustee in Bankruptcy would have no interest; and

(c) Dorothea Huszagh is estopped by reason of a contract based on a valid consideration from seeking to rescind the loss of her interest, and the matter is *res adjudicata* as to her, and had been for more than four months prior to the intervention of bankruptcy. The Illinois Supreme Court has so ruled in a situation in which it must be admitted that the *lex situs* applies. It must be equally obvious that the Trustee in Bankruptcy cannot claim that a federal question is involved simply because he is a Trustee in Bankruptcy.

To Recapitulate:

1. Ten months prior to the intervention of bankruptcy Dorothea Huszagh became divested of her interest in the trust under the will of her father, and this respondent became bound by findings in the decree concerning matters of accounting;

2. The Illinois Supreme Court has held on a mixed question of law and fact that all matters in said action became and were *res adjudicata* more than four months prior to the intervention of the bankruptcy;

3. To ask this Honorable Court to take jurisdiction on the ground that a federal question is involved *merely* through the intervention of bankruptcy more than four months after the transpiration of events, is to ask this Court to exercise a right of review over judicial proceedings and contractual relationships, the determination of which is solely within the purview of the laws of the situs and the State courts having jurisdiction thereof;

4. Every consideration of the facts and the law which warranted the Illinois Supreme Court in finding that Dorothea Huszagh is estopped from having the Cardwell decree vacated (as to which question it will not be denied that the Illinois Supreme Court decision will be respected) must by the same token be definitive of the rights of the Trustee in Bankruptcy where more than four months had elapsed before the filing of the bankruptcy proceedings. This Court will not grant certiorari to review evidence with respect to which the Illinois Supreme Court has made specific findings.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

M. MANNING MARCUS,
Attorney for Fred J. Wegg, as the sole Trustee under the last Will and Testament of Frederick H. Wickett, deceased, one of the Respondents.

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IN THE

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vs.

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Respondents.

BRIEF OF DOROTHEA W. HUSZAGH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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Respondents.

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OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6).

STATEMENT MAKING AGAINST JURISDICTION.

The petitioner improperly substituted a copy of the second opinion of the Illinois Appellate Court in place of

the opinion of the Illinois Supreme Court required by the rules of this court as a part of his petition.

No federal question of law was involved in the matter of the determination by the state trial court and state Supreme Court that consent decrees entered in a creditor's suit, sought to be attacked collaterally, and solely on the ground of a mistake of state law, were, as a matter of state law, *res adjudicata,* more than four months before the filing of a petition in bankruptcy.

The petitioner filed three petitions for certiorari as cases numbered 823, 824 and 825, but he served only one single printed copy bearing all of said numbers on such single copy on counsel for Dorothea W. Huszagh, who has filed in each of said cases her brief in opposition to each of said petitions. The briefs filed on behalf of Mrs. Huszagh are identical, except that the appropriate case numbers are printed on each of the 40 copies filed in this court in regard to each of the three cases. The petitioner, without notice, obtained an extension giving him the maximum time allowed by law to file his petitions for certiorari and serve respondents. At no time has he served this respondent with a copy of the record in any of the cases, although more than twenty days beyond the maximum period of five months since the entry of the judgment of the state Supreme Court have elapsed. It is submitted that petitioner's failure to serve respondents with a copy of the petition and the record filed in each case within the maximum time allowed by statute and rules of this court is, of itself, sufficient ground to deny each of petitioner's petitions.

The only question necessarily involved in the decision made by the state Supreme Court was whether, as a matter of state law, a consent decree can be attacked by a party to such decree solely on the ground of an alleged mistake of law. The bankruptcy act does not purport to grant to

a trustee in bankruptcy any right to attack, on the ground of a mere mistake in state law, a decree of a state court which had become, according to state law, *res adjudicata* more than four months prior to bankruptcy.

The state Supreme Court, in holding that no bill of review would lie either at the instance of the petitioner or at the instance of the counterclaimant, Mrs. Huszagh (the former bankrupt), to set aside the decrees, found as a matter of fact that the decrees were consent decrees and also that for a valuable consideration Mrs. Huszagh, more than four months prior to bankruptcy, had compromised and settled all matters in litigation with Cardwell (judgment creditor) and had agreed not to litigate further any matters pertaining to the creditor's bill proceeding in which the decrees sought to be attacked collaterally were entered.

There is no substantial or important question of law presented by the record. The entire issue below, as far as each of three petitions for certiorari are concerned, is a question of fact in a single case as to whether the decrees sought to be attacked were consent decrees and if, for a valuable consideration, Mrs. Huszagh more than four months prior to bankruptcy had agreed not to file a bill of review. With regard to the facts mentioned, the findings of the trial court were confirmed by the state Supreme Court and this court does not grant certiorari to review findings of fact or to weigh evidence.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioner's "Summary Statement of Matter Involved" is inaccurate and insufficient.

Cardwell, having obtained a judgment on personal service against Mrs. Huszagh, and having execution returned *nulla bona*, filed his creditor's bill in the Circuit Court of

Lake County, Illinois, against Mrs. Huszagh and Fred J. Wegg, as trustee under the last will of Frederick H. Wickett, deceased, who was the late father of Mrs. Huszagh. Under the will of Frederick H. Wickett, deceased, a trust estate was created for the support and maintenance of Mrs. Huszagh, a widow, her six minor children and her sister.

In the creditor's bill suit a decree was entered on November 17, 1939 (Rec. 17-23), which found and adjudicated that the court had heard evidence, had jurisdiction over the parties and the subject matter of the suit; that her interest in the trust estate created by her father's will was subject to sale in order to pay Cardwell's judgment. At the time that decree was entered, there was no other judgment against Mrs. Huszagh and no possible question of bankruptcy law was passed on by the state trial court in entering its decree in the creditor's bill suit, more than ten months prior to bankruptcy.

Seven days after the entry of that decree and within term time, during which the Illinois court had a right to vacate the decree on its motion or on motion of counsel, Mrs. Huszagh, with the advice of her attorney, made and entered into an agreement with Cardwell (Rec. 81-88) pursuant to which for a valuable consideration she agreed that the decree of sale entered in the creditor's suit be carried out according to its intent, which required a sale of Mrs. Huszagh's beneficial interest in the trust at public vendue, and that Mrs. Huszagh would not litigate the matters involved in the creditor's suit further and, in particular, that she would not take an appeal or file a bill of review to attack the decree. Upon advertisement, the sale was carried out, a report of sale was made to the court and, by agreement between the attorneys for Mrs. Huszagh and Cardwell, the judgment creditor, the report of sale was approved ten months before bankruptcy.

In his agreement with Mrs. Huszagh, Cardwell agreed to satisfy the judgment he had obtained at law in another case, irrespective of the amount realized at the master's sale; that if there was an overplus at the master's sale, it would go to Mrs. Huszagh; that Cardwell, in any event, would pay the costs of the proceeding, including master's fees, commissions and expenses (Rec. 81-88). The agreement between Mrs. Huszagh and Cardwell was fully executed (see Opinion of trial court (Rec. 98) and final decree of trial court in bill of review case (Rec. 66-67), and Opinion of Illinois Supreme Court in regard to which having not been served with a copy of the record we cannot cite by the page).

After the entry of the decree approving the master's report of sale in the creditor's suit, a deficiency decree was entered in another case against Mrs. Huszagh with regard to a bond issue (Rec. 77) which she had signed fifteen years ago as an accommodation maker, and such deficiency decree was the only basis of the claim filed in her bankruptcy proceeding.

The petitioner, as the trustee in bankruptcy, a few days less than a year after the decree of sale had been entered in the creditor's suit, filed his bill of review in the Circuit Court of Lake County, Illinois, against Mrs. Huszagh, Cardwell and Fred J. Wegg, as trustee under the will creating the trust, seeking to set aside the two decrees in the creditor's suit solely on the ground that such decrees were entered as a matter of mistake of law because they countervened the provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes.

The state trial court (Rec. 66-67) and state Supreme Court held that no bill of review would lie to set aside consent decrees on the ground of a mistake of law; that Mrs. Huszagh and the petitioner claiming through her, after the lapse of more than four months, were estopped

from maintaining a bill of review by the agreement Mrs. Huszagh made with Cardwell. The opinion of trial court in bill of review case shows that no question of bankruptcy law was involved (Rec. 98) and the decree of the trial court in the case last mentioned does likewise (Rec. 66-67). The state Supreme Court affirmed this decree.

The decree of sale in the creditor's suit is of vital interest to Mrs. Huszagh because it adjudicated (Rec. 17-23) the account between her and Fred J. Wegg, as trustee under her late father's will. According to the will of Mrs. Huszagh's late father, Fred J. Wegg, trustee (Rec. 15), is authorized to give any part of the trust estate to any relative in need, which would include any or all of the six minor children of Mrs. Huszagh. In another suit to construe the will of Mrs. Huszagh's father, the trustee in bankruptcy, although he has not established any right to take the beneficial interest formerly owned by Mrs. Huszagh in the trust estate, has taken what counsel for this respondent regards as a hostile attitude to the rights of Mrs. Huszagh's children. The pendency of another suit is *de hors* of the record in this case, and although it exists in fact it may be treated in this brief only as a possibility in this case. With these facts mentioned, any attack on Mrs. Huszagh for opposing, as she is entitled to do by law (*In re Barnett*, 124 F. (2d) 1005), the three petitions for certiorari filed, more readily may be shown to be immaterial to the consideration of the merits of petitioner's petitions, which must be based on the record herein.

ARGUMENT.

The cross-complaint for review of Mrs. Huszagh, seeking to set aside the decrees in the creditor's bill suit, was predicated (Rec. 43) upon the theory that her interest in the active trust estate created by the last will of her late father for her support and benefit was a spendthrift trust, and being a spendthrift trust Mrs. Huszagh could make no agreement relating to her interest which would operate as a transfer of her interest to Cardwell. At no time in the state court proceedings did Mrs. Huszagh in any way seek to repudiate the agreement which she made and entered into with Cardwell, wherein for a valuable consideration she agreed not to contest further the matters involved in the creditor's suit and, in particular (Rec. 82), not to file a bill of review. The only ground urged by her is although she made such an agreement for a valuable consideration, such agreement pertained to an interest in a spendthrift trust, which she could not transfer or in any wise alienate by her own agreement. If such contention were not correct, then her counsel does not dispute the rule of law well established in Illinois and in federal courts to the effect that a bill of review does not lie to impeach a consent decree. *Harding* v. *Harding*, 198 U. S. 317. The only ground upon which the controlling effect of this rule of law would not be applicable to the facts in the case at bar is on the ground that the nature of Mrs. Huszagh's interest in the trust estate was such that she was not competent to make a contract concerning it.

The trial court (Rec. 66 and 98) and the state Supreme Court, and its opinion, (since the petitioner never served a copy of the record on this respondent, our reference to

state Supreme Court's opinion cannot cite the record page of such opinion) specifically found that the interest was of a character concerning which Mrs. Huszagh was competent to make a contract and that she was bound by her agreement. The Appellate Court of Illinois found that Mrs. Huszagh was bound by her agreement, but held that her trustee in bankruptcy, although more than four months had elapsed since the time of the making of her agreement and the filing of her petition in bankruptcy, was not bound by such agreement. The agreement, according to Illinois law, when made in term time (*Bushnell* v. *Cooper*, 289 Ill. 260, 267), if binding on Mrs. Huszagh made the decree in the creditor's suit sought to be attacked a consent decree, and made the decree *res adjudicata* more than four months before the filing of a petition in bankruptcy. (*Hempstead* v. *Broad*, 275 Ill. 358, 365.) It is anomaly in legal theory for a court to hold that an agreement is legally binding on the parties to the agreement but not on a party claiming after the lapse of more than four months thru one of the parties to such an agreement when the good faith of the agreement is admitted (Rec. 87). There is no provision of the bankruptcy law which, after the lapse of four months, entitles the trustee in bankruptcy to nullify a bona fide agreement which the court finds was legal and valid, and still binding on the parties to such agreement. A decree in a non-bankruptcy court, predicated on the validity of a lien arising before the four months' period, is *res adjudicata* in a bankruptcy court or in a plenary suit filed by the trustee in bankruptcy in the state court.

On behalf of Mrs. Huszagh it is contended that the express provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes, as repeatedly construed by the Illinois Supreme Court and the United State Supreme Court create a rule of property and not merely a rule of procedure; (*Potter* v. *Couch*, 141 U. S. 296, 319; *Spindle* v. *Shreve*, 111 U. S. 543, 548) that the effect of that statute, which

has been in force continuously since 1845, was to make any active trust created in good faith by a resident of Illinois for the support and maintenance of another not subject to the payment of the debts of the beneficiary. This is clearly shown in the recent decision of *Knight* v. *Gregory*, 389 Ill. 554, 561, construing the statute in question. In the case last mentioned, the state Supreme Court stated that the interest of the beneficiary in a trust of the character mentioned, by virtue of the provisions of the Illinois statute, is just as exempt from the payment of debts of a beneficiary as is an interest in a typical so-called spendthrift trust.

The effect of the Illinois statute has been stated by the author in 119 A. L. R. 41 as follows:

> "* * * the effect of the statute appears to be to make all trusts, except those for the benefit of the settlor, spendthrift trusts as against creditors of the beneficiary."

The petitioner ignoring the nature of his bill of review as a collateral attack and assuming that he is trying the merits of the creditor's suit *de novo*, contends that the decision of the Illinois Supreme Court "is contary to *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427." This case has been cited by this respondent in support of the decision of the Illinois Supreme Court because Justice Holmes stated at pages 428, 429, in the court's opinion that:

> "It is established law in Massachusetts that such trusts are valid and effective against creditors, *Broadway National Bank* v. *Adams*, 133 Massachusetts, 170, and, subject to what we are about to say, against assignees in insolvency or trustees in bankruptcy. *Billings* v. *Marsh*, 153 Massachusetts, 311. *Munroe* v. *Dewey*, 176 Massachusetts, 184. The trustee in bankruptcy seeks to avoid the effect of these decisions on the ground that Mrs. Luke's equitable life interest was held by the Supreme Court of the State to be assign-

able, and that therefore it passed under § 70a (5) of the Bankruptcy Act, vesting in the trustee all property that the bankrupt 'could by any means have transferred.' The Supreme Judicial Court, however, held that the above cited cases governed and that the property did not pass. 220 Massachusetts, 484.

* * *

"The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. *Dunn* v. *Dobson*, 198 Massachusetts, 142, 146. *Lathrop* v. *Merrill*, 207 Massachusetts, 6, 9. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this court to weigh the reasoning upon which it has been established by the Massachusetts cases, *Page* v. *Edmunds*, 187 U. S. 596, 602, it has been established too long and is too nearly sanctioned by the decisions of this court to be overthrown here. *Nichols* v. *Eaton*, 91 U. S. 716. *Shelton* v. *King*, 229 U. S. 90, 99. The policy of the Bankruptcy Act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

The petitioner refers in his petition not to what was the actual decision of this court in the case last mentioned, which affirmed the judgment of the Massachusetts Supreme Court, but he quotes a part of the discussion in the opinion which is in no wise applicable to the case at bar and which might relate to a case in which the bankrupt "could have freed from the trust *both the fund* and any proceeds received by her." In the case at bar, no one contends that Mrs. Huszagh "could have assigned her interest and by so doing could have freed from the trust *both the fund* and any proceeds received by her." According to the will of her late father (Rec. 15) creating the trust, Mrs. Huszagh's interest in the trust was a contingent interest, dependent not only upon her

continuing life but also dependent upon whether the trustee under the will would give away the corpus to a relative of the testator in need. Under the terms of her father's will, never could Mrs. Huszagh have freed the fund from the trust. Furthermore, in the case at bar the Illinois Supreme Court determined that the proper construction of Section 49 of Chapter 22 of the Illinois Revised Statutes "as limiting the character of the equitable property and inherent in it" with regard to the equitable interest of Mrs. Huszagh in the trust created by her late father's will. This court follows the construction of a state statute as made by the state Supreme Court.

As stated at page 946 of Collier's Bankruptcy, Vol. 4 (14th Edition):

> "The courts are frequently moved to reassert the general rule that the act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or his creditors at the time the trustee's title accrues."

The petitioner contends that the decision of the Illinois Supreme Court to the effect that Mrs. Huszagh was estopped by her agreement made with Cardwell ten months before bankruptcy was correct in so far it relates to Mrs. Huszagh, and, therefore, he cannot contend logically that he derived any right under Section 70a(5) from Mrs. Huszagh who had bargained away her right ten months before bankruptcy. The only right, if any, which would be left to the petitioner was the right similar to that of a judgment creditor under Section 70c of the bankruptcy act. However, the petitioner also contends that a judgment creditor in Illinois has no right to subject the former interest of Mrs. Huszagh to the payment of a judgment; and he, therefore, disclaims any rights under Section 70c of the bankruptcy act. Having no rights to maintain an adverse plenary suit against Wegg, as trustee under the

will, or against Cardwell, or Mrs. Huszagh, who has received her discharge in bankruptcy (Rec. 96) under Section 70c, and since Mrs. Huszagh had no title to her interest in the trust to give the petitioner at the time she filed her petition in bankruptcy, the Illinois Supreme Court was right in holding that the petitioner had no right to maintain his bill of review.

The discussion which the Illinois Supreme Court made in its opinion of the bankruptcy act was not the basis of its judgment, which held that under the state law a consent decree made ten months before bankruptcy could not be set aside on the sole ground of an alleged error of law. The opinion of any court is not broader than the facts in a particular case in which it is rendered. However, it is submitted, the scope of section 70c of the bankruptcy act was correctly delineated in the opinion of the Illinois Supreme Court.

The purpose of Section 70c is set forth in a note prepared by its draftsmen—and appearing at 45 Cong. Rec. 2277 (1910). (Reproduced in Collier, 14th Ed., Vol. 4, page 1252, as follows:)

> " 'The proposed amendment, while correcting the defect named, (secret liens) at the same time carefully guards the rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas, quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; and, second, that *as to property not in the custody of the bankruptcy court, the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In this way, in effect, proceedings in bankruptcy will give to creditors the same rights that*

creditors under the state law would have had had there been no bankruptcy, and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee.' 45 Cong. Rec. 2277 (1910)." (Matter in parenthesis and italics added.)

The state Supreme Court, in applying Section 70c with respect to the trust interest of Mrs. Huszagh did just as the draftsmen intended. The court decided that "in effect, proceedings in bankruptcy will give to creditors the same rights that creditors under the state law would have had had there been no bankruptcy, * * *." Petitioner not only concedes, but, in fact, he predicated his bill of review on the sole premise that because of the effect of Section 49 of Chapter 22 of the Illinois Revised Statutes no creditor in Illinois could subject the interest of Mrs. Huszagh in the trust to the payment of a judgment.

It would create an anomalous situation fraught with many difficulties to mix indiscriminately the matter of remedies with the matter of property rights, with avowed intention of cutting down a bankrupt's property rights under state statutes and decisions by giving to the trustee in bankruptcy greater remedies as plaintiff in a plenary suit filed by him in the state court than would be afforded any other plaintiff of any kind or description whatsoever, with the net result that an interest in a trust estate, which under the Illinois laws could not be taken for the payment of a debt, could be taken in a plenary suit for the payment of a debt only by a trustee in bankruptcy. It always has been the policy of Congress in enacting all bankruptcy laws to respect property rights created by state law. In such states as recognize the validity of spendthrift trusts, the courts recognize the particular character or property right of such interest and will not permit the trustee in bankruptcy to recover it. The property right given to the beneficiary in a trust within the purview of

Section 49 of the Illinois Chancery Act is just as sacred in contemplation of the bankruptcy law as would be the same right if it were merely defined categorically in the instrument creating the trust, as immune from liability to pay debts. Under the laws of the State of Illinois, it is just as free from liability to pay debts as an interest in a trust specifically characterized in the instrument creating the trust, as a property right free from any liability to pay the debts of the beneficiary. (*Knight* v. *Gregory*, 389 Ill. 554, 561.) The will of Mrs. Huszagh's father creating the trust must be read in contemplation of the then existing Section 49 of Chapter 22 of the Illinois Revised Statutes to the same extent as if the testator quoted the statute last mentioned in his will.

The petitioner cannot argue properly that the interest of a beneficiary in a spendthrift trust, or any trust created in good faith by a person other than the beneficiary made just as immune from the attacks of a creditor as a spendthrift trust by virtue of the public policy of the State of Illinois as evidenced by Section 49 of Chapter 22 of the Illinois Revised Statutes, can be taken, administered and sold by a trustee in bankruptcy of the beneficiary. There is no basis in the bankruptcy law for discrimination between interests in trusts of the character just mentioned, which have the common characteristic of not being subject to be taken for a debt of the beneficiary. If there were any difference, the stronger case is made for the trust within the purview of the state statute. Furthermore, such a question was not presented by the facts in the case at bar to the Illinois Supreme Court, which held that the consent decrees in the creditor's suit could not be attacked collaterally for a mistake of law after the lapse of four months before bankruptcy. The primary question before the Illinois Supreme Court was the validity of the consent decrees attacked collaterally. The petitioner argues his case in his petition as if he were trying the creditor's suit

de novo in his bill of review, which he cannot do according to the judgment of the Illinois Supreme Court.

The United States Supreme Court, in the matter of construing the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, follows the decision of the Illinois Supreme Court. (*Erie* v. *Thompson,* 304 U. S. 64; *Page* v. *Edmunds,* 187 U. S. 596, 602.)

In any case, the question of the availability of a bankrupt's trust income to the trustee in bankruptcy is to be determined by the law of the situs of the trust, and the trustee must bring a plenary action authorized by the state law against the party holding an adverse interest and the trustee of the trust estate. (*Cline* v. *Kaplan,* 323 U. S. 97; *In re Baudouine,* 101 Fed. 574; *In re Whitney,* 113 F. (2d) 426, 428, 429). In the case last mentioned, the Circuit Court of Appeals of the Second Circuit stated at pages 428-9 of its opinion:

> "* * * The interest of a *cestui* in a trust is not like an interest in a stock exchange seat. * * *
>
> "The property in the hands of the Fiduciary Trust Company was not in the actual or constructive possession of the bankruptcy court. That company was an adverse claimant entitled to litigate its claims in the prior state court suit without interference from the bankruptcy court."

In the case of *In re Allee,* 55 F. (2d) 76, at page 77, the Circuit Court of Appeals stated:

> "This court has held that such trustee (in bankruptcy) is not to be considered as a purchaser for value, but that his powers, rights, and title are the same as any other judgment creditor, who holds a returned and unsatisfied execution, and that he cannot in any case take property not belonging to the bankrupt."

In *Cline* v. *Kaplan,* 323 U. S. 97, in an opinion by Justice Frankfurter, this court stated in its opinion:

> "If the property is not in the court's possession and a third party asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated in suits of the ordinary character, with the rights and remedies incident thereto."

Suits of "an ordinary character and with the rights and remedies incident thereto" would not sanction the granting of relief to a trustee in bankruptcy as the plaintiff in a state plenary suit not available to any other plaintiff in any other case in such state court.

Nearly all property of a bankrupt not subject to the claims of creditors can be transferred or in some manner alienated by him. The United States Supreme Court will not construe the state statute to give an interest in a trust, within the statute, a different character, not inherent in it. The right of homestead, rights to insurance in favor of widows, and the like, can be released by the bankrupt, but the trustee in bankruptcy cannot claim them under Section 70a(5) of the bankruptcy act as property which the bankrupt by any means could have transferred, in case where the state statute makes such interests immune from the claims of creditors. There are a number of so-called "rights" of a bankrupt which more than four months prior to bankruptcy the judgment debtor could compromise, settle or alienate, in good faith, for a valuable consideration, which do not pass to a trustee in bankruptcy. It has been held that since a creditor under state law cannot avoid the assignment of mere expectancy, his trustee in bankruptcy cannot do so. (*In re Barnett*, 124 F. (2d) 1005) (2nd Cir. Ct. of Appeals.) The mere expectancy could not be taken for the payment of a debt at the time it was assigned, and at a later date although the expectancy changed, the trustee in bankruptcy could not set aside the assignment.

A contingent attorney's fee not fully earned is not property which passes to the trustee in bankruptcy, although

the court held that it was assignable, or could be compromised or released. (*In re Coleman, Attorney*, 87 F. (2d) 753.) The fee of a trustee is not fully earned until the estate is closed, and does not pass to the trustee in bankruptcy. (*In re Furness*, 75 F. (2d) 965) (2nd Cir. Ct. of Appeals.)

The petitioner contends that Mrs. Huszagh could have assigned her interest in the trust created by her father's will and, therefore, it "passed" to the trustee in bankruptcy. However, the flaw in his argument is obvious because the interest was in Cardwell more than ten months before bankruptcy and did not pass from Cardwell to the trustee in bankruptcy when Mrs. Huszagh filed her voluntary petition in bankruptcy. Furthermore, if Mrs. Huszagh could assign or transfer her interest, there is no basis for the contention that by virtue of her agreement with Cardwell, which she had a right to make, with the advice of her counsel, according to the Illinois Supreme Court, she did not transfer. (*Hudnall* v. *Ham*, 183 Ill. 486.) If her interest were to any extent transferable and were not an interest in a typical spendthrift trust, she could make by contract a consent decree just as well as she could make a bill of sale or other written assignment. (*King* v. *King*, 215 Ill. 100, 115, 119.) However, in the case at bar. Mrs. Huszagh could not transfer any right to the trust *res* (see Will, Rec. 12-15) within the dictum of *Eaton* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427. The case at bar is stronger against the petitioner than the actual decision of the Court in the case last mentioned, because in the case at bar the state Supreme Court construed the effect of an Illinois statute as effecting the immunity or particular character of the interest of Mrs. Huszagh in the trust; and the United States Supreme Court adopts the construction placed upon an Illinois statute by the Illinois Supreme Court. Furthermore, in the case at bar the creditor's bill suit cannot be tried *de novo* by the petitioner's bill of review, and consent decrees entered more than

four months before bankruptcy, not set aside by the judgment of the Illinois Supreme Court, will not be set aside by this court, because no question of bankruptcy law was involved in the matter of entering the decrees in the creditor's suit.

In the case at bar, we are not met with a mere judicial construction of the common law of the State of Illinois as to whether the interest of Mrs. Huszagh passed to Cardwell more than ten months prior to bankruptcy, and did not pass to her trustee in bankruptcy when Mrs. Huszagh filed her petition in bankruptcy. By virtue of the express provisions of Section 49 of Chapter 22 of the Illinois Revised Stautes, we are met with a construction of a state statute, the effect of which is to make the interest of the beneficiary in the trust of the character created by the last will of Mrs. Huszagh's father immune from claims of all judgment creditors or other debts and, therefore, *ipso facto* immune from the claim of the trustee in bankruptcy, who is merely the *alter ego* of a creditor. The immunity of the interest in the Illinois trust created by another is just as inherent in it as is the immunity of an interest in a typical spendthrift trust. The trustee in bankruptcy contends that the interest, as far as it pertains to current income, may be transferred by the beneficiary, but, if so, he fails to grasp the fact that the beneficiary can consent in another lawsuit concluded more than ten months prior to bankruptcy to waive her immunity for a valuable consideration. In fact, the petitioner argues that the interest is immune as to any creditor, unless such creditor have as his intercessor in a plenary suit in an Illinois court the trustee in bankruptcy. Without any claim filed in bankruptcy, a trustee in bankruptcy could not maintain suit to recover alleged assets of the bankrupt. He does not function for his own benefit, but for the benefit of creditors, who have filed a claim. In the case at bar, the petitioner goes further than merely erroneously seek-

ing to maintain a *de novo* suit regarding Mrs. Huszagh's interest; he contends that he can set aside judicial proceedings concluded in good faith more than four months prior to bankruptcy, which had become *res adjudicata* as to the bankrupt more than four months prior to bankruptcy. In other words, the petitioner contends that the trustee in bankruptcy is given a right to proceed in a plenary suit in a state court, and, according to the state law, which would not redound under any circumstances whatsoever, to any other plaintiff in any other case. He seeks to revamp by forced construction, Section 49 of Chapter 22 of the Illinois Revised Statutes to read in effect that it is the intention of the State legislature that this section shall have no application to any suit brought by a trustee in bankruptcy. However, the rule created by the statute mentioned is not a rule of procedure depending upon what party is the plaintiff, as the petitioner contends, but is a rule of property which applies to all litigants, whether such litigant be a trustee in bankruptcy or a judgment creditor representing himself.

It has repeatedly been held by the United States Supreme Court and courts of various jurisdictions that an interest in a trust estate which, according to the law of the state in which such interest was created and in which the bankrupt was domiciled, was not subject to the payment of his debts, is not of a character which passes to a trustee in bankruptcy. In the case at bar, this would be readily admitted by counsel for the petitioner as to the spendthrift trust. The character of the label attached to such interest in the Illinois trust protected by the Illinois statute is immaterial. As far as the bankruptcy act is concerned, there is no more difficulty incurred in holding that the interest of a beneficiary in a trust protected or construed as within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, does pass to a trustee in bankruptcy, than there is to hold that the in-

terest in a typical spendthrift trust does not pass to the trustee in bankruptcy. In some states spendthrift trusts are not recognized as valid, but in Illinois and other states where they are valid the interest in such trust does not pass to a trustee in bankruptcy. Even if there had been no creditor's bill proceeding, the petitioner has no right to succeed in a plenary suit in the state court against the beneficiary and the trustee under the will creating the trust, protected against the claims of creditors by virtue of Section 49 of Chapter 22 of the Illinois Revised Statutes. The interest of the beneficiary in the trust estate, in the case at bar, by virtue of Section 49 of Chapter 22 of the Illinois Revised Statutes, is just as immune from the claim of creditors as is the interest of a beneficiary in a typical spendthrift trust. (*Knight* v. *Gregory*, 389 Ill. 554, 561.) By judicial proceedings in a state court the trustee in bankruptcy seeks to take for the benefit of the single creditor represented by him, as trustee in bankruptcy, the identical interest in a trust which, he argues, is protected by the positive enactment of the Illinois statute from the claims of all creditors in any sort of an action in any court in the state of Illinois. The Illinois statute does not purport to discriminate in favor of a creditor represented by a trustee in bankruptcy.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be read as if incorporated in every will creating in good faith a trust for support of another since the time this statute was passed in 1845, is a rule of property characterizing the beneficiary's interest in such trust. This principle was recognized in the case of *Potter* v. *Couch*, 141 U. S. 296, 312; *Spindle* v. *Shreve*, 111 U. S. 543, 548; *Hull* v. *Farmers Loan & Trust Co.*, 245 U. S. 312, as well as *Eaton* v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427. However, the question of the immunity of Mrs. Huszagh's interest was not before the state Supreme Court for its determination, because the Supreme

Court of Illinois held that for a valuable consideration the beneficiary in the trust could waive or release her immunity and that Mrs. Huszagh had done so more than ten months before bankruptcy. The fact that Mrs. Huszagh, as the beneficiary in the trust created by her father's will, could release her interest in the trust for a valuable consideration in a consent decree is not synonymous with a holding that interest so released was not within the purview of statutory created immunity. Furthermore, if there were no statutory immunity from liability to pay debts attached to Mrs. Huszagh's interest, then no error of law, aside from any question of consent, was incurred in the creditor's suit. The petitioner contends that every creditor except himself was barred by such immunity, but he was not a party to the creditor's suit. The agreement for release was made ten months before bankruptcy and related to a subject matter concerning which the Illinois Supreme Court stated that she was competent to contract. If Mrs. Huszagh's interest in the trust created by her father's will was not a matter concerning which she was competent to make a contract with Cardwell, it certainly was not an interest which could be transferred by her. The judgment of the state Supreme Court to the effect that she made a valid contract with Cardwell ten months before bankruptcy was the determination of a question of state law, which this court will not review. It related to proceedings concluded ten months before bankruptcy.

Section 70a of the bankruptcy act does not define exemptions and does not purport to create substantive rights and formerly non-existing remedies in favor of the trustee in bankruptcy, (*Holden* v. *Stratton*, 198 U. S. 202; *Steele* v. *Buel*, 104 Fed. 968) which in any wise would militate against or change the construction of the Illinois statute, namely, Section 49 of Chapter 22 of the Illinois Revised Statutes, relating to the character of the beneficiary's interest in a trust estate created in good faith by someone

else for the support and maintenance of another person. It is a confusion of thought to call any kind of a claim a "right" and then, upon the basis of such alleged "right" to contend that property rights under the Illinois statute have been changed. A trustee in bankruptcy, by virtue of the bankruptcy act, is given such specific powers as are therein enumerated, but there is no provision in the act which purports to make property not in the hands of the bankrupt but held in trust for him and others on an active trust amenable to the payment of bankrupt's debts, as represented by the trustee in bankruptcy, when a particular interest in the trust property is immune, by reason of the positive enactment of the state law, from the claim of any creditor. The filing of bankruptcy did not change the effect and validity of a state court's decree in the creditor's suit, which, according to the holding of the Illinois Supreme Court, had become *res adjudicata* more than four months before it was attacked by the petitioner's bill of review.

Petitioner contends that the decrees in the creditor's suit, which both he and Mrs. Huszagh attacked collaterally, petitioner by his bill of review and Mrs. Huszagh by her counterclaim for review, should be regarded as binding upon Mrs. Huszagh, but since Mrs. Huszagh ten months later filed her petition in bankruptcy, the identical decrees, as a matter of law, should be regarded as "changed" by the bankruptcy act, only as far as the rights of the petitioner are concerned. The correctness of the decrees in the creditor's suit, at the time they were entered, was a question to be determined solely by state law, and the only ground upon which the petitioner attacks the correctness of such decrees as of the time they were entered was that they were entered in contravention of the state statute, namely, Section 49 of Chapter 22 of the Illinois Revised Statutes. Not only was the correctness of the decrees, when entered, in the creditor's suit a question of state law,

but the question of the correctness of such decrees when attacked collaterally still remains solely a question of state law and their validity still relates back to the time of their entry which was ten months prior to bankruptcy. The state Supreme Court decided only a question of state law when it held that such decrees could not be attacked collaterally by the petitioner's bill of review or by Mrs. Huszagh's counter-claim for review. If the Supreme Court merely had denied relief to the trustee in bankruptcy and had given relief to Mrs. Huszagh, then it would have decided that there was error in the trial court's decree. By affirming the trial court's decree the state Supreme Court held that the decree was valid at the time of its entry.

It is not true, as petitioner argues, that the section of the Illinois Statute mentioned pertains only to creditors' suits. It is not a mere rule of procedure but a rule of property, and the interest is immune from the claims of creditors no matter what is the form of judicial procedure, whether in equity or at law. *Potter* v. *Couch,* 141 U. S. 296, 319; *Dunham* v. *Kauffman,* 385 Ill. 79; *Baumgarden* v. *Reconstruction Finance Corporation,* 131 Fed. (2d) 741.

If it still be argued that Section 49 of Chapter 22 of the Illinois Revised Statutes appertains only to matters of procedure and not to matters of substance, then it must be borne in mind that according to the laws of the State of Illinois no bill of review lies to correct a decree only on the ground of alleged error in procedure. *Vyverberg* v. *Vyverberg,* 310 Ill. 599; *Knaus* v. *Chicago Title and Trust Company,* 365 Ill. 588, 592, 593; *Cullen* v. *Stevens,* 389 Ill. 35.

The United States Supreme Court from the time of its foundation has adhered to the principle that it will not review judgments of the state court that rest on adequate and independent state grounds, and that it will not use

its power merely to correct allegedly wrong judgments, and to revise opinions. The state Supreme Court by affirming the trial court decree, refused to set aside a former decree of the trial court, attacked collaterally, and in so doing it decided a question of state law which previously had been determined ten months before bankruptcy and therefore, did not involve and could not involve any question of bankruptcy law.

Mrs. Huszagh filed no petition for a writ of certiorari in this court because her counsel is of the opinion that no federal question was involved in the decision of the Illinois Supreme Court. If there was an error in judgment of the State Supreme Court such error only affected the rights of Mrs. Huszagh, which she has sought to protect throughout the litigation.

CONCLUSION.

No question of federal law is involved in this cause, and each of the three petitions for writ of certiorari in cases 823, 824 and 825 should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No. 823

FRED E. HUMMEL, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF DOROTHEA W. HUSZAGH,
Petitioner,

vs.

JAMES R. CARDWELL, DOROTHEA W. HUSZAGH AND FRED J. WEGG, AS THE SOLE TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF FREDERICK H. WICKETT, DECEASED,
Respondents.

BRIEF OF JAMES R. CARDWELL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

OPINION BELOW.

The opinion below is reported in 390 Illinois Supreme Court Reports at page 526 (advance sheets, 390 Ill. No. 6), and is set forth in full in the appendix hereto. It also appears (Rec. pp. 125-132).

STATEMENT MAKING AGAINST JURISDICTION.

Petitioner has not appended to his petition a copy of the opinion of the Supreme Court of Illinois, as required by rule 12, paragraph 1, of this court. Contrary to the rules

of this court, petitioner annexed to his petition a copy of the second opinion of the Illinois Appellate Court. Petitioner has not furnished an index to the record of the Illinois Supreme Court.

There was an adequate and independent non-federal ground of decision to support the judgment of the state Supreme Court. The advent of bankruptcy *ipso facto*, occuring more than four months after the entry of the decrees sought to be attacked, collaterally, solely on the ground of an alleged error of law (Rec. 27), in no wise affected the vadility of such decrees. The sole issue sought to be raised in the trustee in bankruptcy's bill of review was whether, making particular reference to Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29; 129) the trial court in the creditor's suit committed an error of law in entering the decrees it entered in that case. No contention was made in any state court that the bankruptcy act was repugnant to the particular Illinois statute involved. The state Supreme Court affirmed the decree of the trial court dismissing for want of equity not only the complaint for review of the trustee in bankruptcy but also the counterclaim for review of Mrs. Huszagh filed in the identical suit; and the gist of its decision was that if there were any error of law committed by the state trial court in entering the decrees in the creditor's suit, a bill of review would not lie at the instance of the trustee in bankruptcy nor at the instance of the judgment debtor, because such decrees were entered more than four months prior to bankruptcy, and pursuant to an agreement made between Mrs. Huszagh (the former judgment debtor) and Cardwell (the former judgment creditor), which, as stated in the opinion of the state Supreme Court, "related to matters in which they were both competent to contract and resulted in the decrees entered by the trial court, becoming consent decrees" (Rec. 132).

The construction which the Illinois Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised

Statutes (Rec. 130) related to the interpretation of an Illinois statute in regard to which the federal court would follow the state Supreme Court. The gravamen of the decision was to the effect that a consent decree made, as stated in the state Supreme Court's opinion (Rec. 132) between "parties competent to contract" and in regard to which "Cardwell could not be placed in *statu quo*" (Rec. 132) made the attacked decree *res adjudicata* more than four months prior to the advent of bankruptcy and Mrs. Huszagh, or anyone claiming thru her, after the lapse of more than four months was estopped (Rec. 132) from seeking to attack collaterally the consent decrees solely on the ground of an alleged error of law. Whether the decrees were consent decrees was a question of fact found by the trial court and confirmed by the Illinois Supreme Court, in regard to which this court does not grant certiorari to review.

No substantial or important question of law is presented by this record.

The entire issue below was one of fact.

As a further ground for showing that this court lacks jurisdiction, it should be noted that the petitioner filed three petitions for certiorari, Cases No. 823, 824 and 825. He only has served counsel for James R. Cardwell with a single copy of only one petition and a single copy of the record which bore all three case numbers on it. No order consolidating the three petitions has been entered, and the service of only one copy does not comply with the jurisdictional requirement of service of a copy of petition for certiorari on counsel for the respondent within ten days from the filing of each of such petitions in this court. In the absence of an order of consolidation in this court, each petition for certiorari stands as a separate case on its own merit as far as meeting the jurisdictional requirements of this court, including the matter of serving counsel for the respondents, is concerned.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner's "Summary Statement of the Matter Involved" is incorrect, incomplete and misleading.

On October 11, 1939, James R. Cardwell, a judgment creditor, filed in the Circuit Court of Lake County, Illinois, his creditor's bill (Rec. 5) making Dorothea W. Huszgah and Fred J. Wegg, as trustee under the last will and testament of Frederick H. Wickett, deceased, parties defendant thereto. In the pleadings filed in the creditor's bill suit, no mention was made of Section 49 of Chapter 22 of the Illinois Revised Statutes, which protects certain types of interests in active trusts created by another in good faith for continuing support of the beneficiary from being subjected to the payment of the debts of the beneficiary by any proceeding at law or in equity brought by a creditor. Dorothea W. Huszagh, in her answer (Rec. 15-17) to the creditor's bill, as a defense to the same alleged that the trust created by her late father's will was a spendthrift trust and as such was not subject to be taken for the payment of any judgment against her thru a creditor's bill. The court heard evidence but no transcript of evidence was preserved in the creditor's bill suit, the preservation of such evidence was not necessary under the Illinois law to sustain the validity of the decree.

On November 17, 1939, the state Circuit Court in the creditor's suit entered a decree of sale in which it was specifically found and decreed (Rec. 17-18) that the court had jurisdiction over the parties and the subject matter; that the trust in question was not a spendthrift trust and it was subject to be sold at public vendue to pay the judgment of Cardwell. The state statute cited (Sec. 49 of Chap. 22 Ill. Rev. Stat.) purports to protect only the interest of a beneficiary in a trust estate created in good faith by another. It is always a question of fact, shown by the evidence, whether the trust was created in good faith, and

on collateral attack in a bill of review the state court is not privileged to determine what evidence another court heard or did not hear. There was no proof in the bill of review case as to whether Mrs. Huszagh had contributed to the trust in question.

Seven days after the entry of the decree of sale in the creditor's suit and during term time of the court, Dorothea W. Huszagh made and entered into an agreement with Cardwell, in respect to which the Supreme Court of the State of Illinois in its opinion (Rec. 131-132) said:

> "Within seven days after the entry thereof, the attorney for Mrs. Huszagh approached counsel for Cardwell and asked him if his client would bid the full amount of his judgment upon which the creditor's bill was predicated, so that there would be no deficiency unsatisfied against Mrs. Huszagh. After a complete conversation, the attorney for Cardwell agreed that he would, on behalf of his client, satisfy the entire judgment if Mrs. Huszagh would agree not to litigate the case further. The proposition was submitted to Mrs. Huszagh and she approved the same and authorized her attorney to enter into such agreement. Pursuant to such arrangement, Cardwell was the successful bidder at the sale. He paid all of the costs, including the master's fees. He prepared a satisfaction piece which was approved by Mrs. Huszagh's attorney and filed in the cause. Both Mrs. Huszagh and her attorney testified to the facts above related in the bill of review hearing and the said agreement was fully executed. Mrs. Huszagh accepted the benefits of this agreement which was executed more than four months before she filed her petition in bankruptcy. Cardwell cannot now be placed *in statu quo* and we believe that Dorothea W. Huszagh is precluded and estopped from obtaining any relief under her counterclaim or from relitigating any of the questions determined in the creditor's suit. The trial court had full jurisdiction to pass upon all of the questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a

spendthrift trust. Dorothea W. Huszagh is now estopped from litigating those questions again in the bill of review case.

24. It appears clear to this Court that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract, and resulted in the decrees, entered by the trial court in the creditor's suit, becoming consent decrees."

After the making of this agreement, the Circuit Court by agreement of the parties entered its decree approving the master's report of sale (Rec. 84).

Ten months after the entry of the decrees mentioned, Mrs. Huszagh filed her voluntary petition in bankruptcy (Rec. 17; Rec. 4) and, thereafter, the petitioner filed his bill of review in the Circuit Court of Lake County, seeking to set aside the decree of sale and the decree approving the master's report of sale in the creditor's bill suit, on the ground that such decrees were entered erroneously because Section 49 of Chapter 22 of the Illinois Revised Statutes (Rec. 27-29) provided that an interest in a trust estate created in good faith by someone other than the beneficiary could not be taken and sold by any judicial process for the payment of a debt of the beneficiary (Rec. 28-29; 131).

The trial court dismissed the complaint filed by the petitioner and also the counterclaim for review filed by Mrs. Huszagh for want of equity, holding, as a matter of fact and of law, that by reason of the agreement which Mrs. Huszagh made and entered into with Cardwell the decrees sought to be attacked became consent decrees and that, furthermore, since Mrs. Huszagh for a valuable consideration had agreed not to take any steps to litigate further the subject matter of the creditor's bill suit or the decree of sale, by appeal, bill of review or otherwise; and since Cardwell could not be placed in *statu quo,* Mrs. Huszagh was estopped more than four months prior to the advent

of bankruptcy from attacking said decrees. Since Mrs. Huszagh for more than four months before bankruptcy had been estopped from attacking said decrees, her trustee in bankruptcy did not have any greater rights to attack (on the sole ground of a mistake of law) the decrees, than Mrs. Huszagh had four months prior to bankruptcy. In other words, the event of bankruptcy did not *ipso facto* recreate rights which had been bargained away in good faith and for a valuable consideration more than four months before bankruptcy.

The trial court in the bill of review case (Rec. 66) found that in the creditor's bill suit the court had jurisdiction over the parties and the subject matter of such decree, and the Supreme Court of Illinois in its opinion, confirmed the finding of the trial court, stating:

> "The trial court had full jurisdiction to pass upon all questions at issue in that case, including the controversy as to whether or not the will of Frederick H. Wickett created a spendthrift trust." (Rec. 132.)

NOTE: Since the petitioner did not attach a copy of the opinion of the Supreme Court to his petition, as is required by the rules of this court, this respondent has attached a copy of such opinion as an appendix to his brief for the convenience of the court.

THE QUESTIONS PRESENTED.

Although a variety of questions might be regarded as incidentally involved in the decision of the Illinois Supreme Court, that decision does not basically involve more than one question of fact in respect to which the testimony in the bill of review case was undisputed, namely, did Mrs. Huszagh and Cardwell within term time make and enter into an agreement whereby, for a valuable consideration, Mrs. Huszagh agreed not to litigate any further the matters involved in the creditor's bill suit, and by reason thereof the decrees in the creditor's bill case became consent decrees and whereby Mrs. Huszagh, more than four

months prior to the advent of bankruptcy, already was estopped from filing any bill of review or otherwise attacking the decrees in question.

As a matter of Illinois law, this respondent contends that the decrees in the creditor's suit were valid and not subject to any collateral attack, independently of the making of the agreement between Cardwell and Mrs. Huszagh; because the validity of the creditor's bill suit on a collateral attack does not depend upon technical correctness of any pleadings in such suit but upon the evidence heard and considered by the trial court in the creditor's suit (*Stoll* v. *Gottlieb,* 305 U. S. 165, 172, 176), which was not preserved and which, if it was preserved, could not be considered on a collateral attack; and because the unknown evidence in the creditor's suit might have indicated that Mrs. Huszagh had contributed to the trust in question and then, under the Illinois authorities, she would not be entitled to the protection of Section 49 of Chapter 22 of the Illinois Revised Statutes. (*Requa* v. *Graham,* 187 Ill. 67.) Furthermore, her failure to plead or interpose the defense of that statute precluded her from attacking the decrees of the trial court upon the ground of the error claimed by her trustee in bankruptcy.

At the time of the entry of the decrees in the creditor's bill suit sought to be attacked collaterally, no question of bankruptcy law was involved. Mrs. Huszagh did not file her petition in bankruptcy until ten months later (Rec. 4; 27-28.) The validity of the decrees attacked collaterally by a bill of review involved solely a question of state law, as that law was at the time of the entry of the decrees attacked.

The construction which the state Supreme Court placed upon Section 49 of Chapter 22 of the Illinois Revised Statutes was a matter of state law decided by a state court ten months before the advent of bankruptcy, and it did not involve the determination of any question of bankrupcy law.

PROPOSITIONS OF LAW.

I.

A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys, in case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

Harding v. *Harding*, 198 U. S. 317, citing 11 Ill. 540.
Bergman v. *Rhodes*, 334 Ill. 137.
Crow v. *Harrison*, 248 Ill. 462.
King v. *King*, 215 Ill. 100, 115, 119 (did not challenge jurisdiction of court below cannot raise the same on appeal).
Armstrong v. *Cooper*, 11 Ill. 540.
Harrigan v. *County of Peoria*, 262 Ill. 36.

II.

In a case where no question of public policy is involved, and the parties are competent to contract, regarding the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it can make no difference whether the decree is erroneous or even void for want of jurisdiction, for the defendant is, nevertheless, bound by his agreement not to attack its validity.

Bergman v. *Rhodes*, 334 Ill. 137.
King v. *King*, 215 Ill. 100.
Smucker v. *Larimore*, 21 Ill. 267.
Corwin v. *Shoup*, 76 Ill. 246 (minor accepting proceeds of a void sale on becoming of age is estopped to prosecute writ of error).

Trapp v. *Off*, 194 Ill. 287.
Hudnall v. *Ham*, 183 Ill. 486.
Hempstead v. *Broad*, 282 Ill. 524.
Bonney v. *Lamb*, 210 Ill. 75, 98.

III.

The Supreme Court of the United States of America does not grant the writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts in a case where the trial court and the Supreme Court of the State of Illinois have concurred in their findings to the effect that the decrees sought to be attacked collaterally were consent decrees.

United States of America v. *Commercial Credit Co.*, 286 U. S. 63, 67.

Luckenbach v. *McCahan Sugar Refining Co.*, 248 U. S. 139.

> "We do not grant a certiorari to review evidence and discuss specific facts."

United States of America v. *Johnston*, 268 U. S. 220, 227.

IV.

Since the protection, if any, afforded the defendant in a creditor's suit by Section 49 of Chapter 22, Illinois Revised Statutes, may be waived by the defendant and is waived if not asserted when opportunity is afforded, there was no error of law committed by the court in entering the decree in the creditor's suit.

Binns v. *La Forge*, 191 Ill. 598 (creditor's suit).
Wright v. *Dunning*, 46 Ill. 271, at 275 (foreclosure).
The People v. *Fisher*, 340 Ill. 250, at 261.
Harrigan v. *County of Peoria*, 262 Ill. 36.
Hunsley v. *Aull*, 387 Ill. 520, at 523.

V.

Section 49 of the Illinois Chancery Act (Chap. 22, Ill. Rev. Stat.) does not protect a trust which ostensibly proceeds from some person other than the defendant, if, in fact, the defendant directly or indirectly contributed any part of the trust fund, either at the time of its creation or subsequently thereto, and it is always a question of fact whether such defendant did contribute, which need not appear merely from the pleadings in the case, and such question of fact cannot be tried de novo by a bill of review.

Re Qua v. *Graham,* 187 Ill. 67.
Linn v. *Dowling,* 216 Ill. 64.
Harrigan v. *County of Peoria,* 262 Ill. 36.

VI.

A decree in a non-bankruptcy court predicated on the validity of a lien arising more than four months before bankruptcy is res adjudicata in a subsequent suit commenced by the trustee in bankruptcy.

Blair v. *Brailey,* 221 Fed. 1, 4. (Cir. Ct. of Appeals, 5th Circuit—cert. denied 238 U. S. 638.)

VII.

The trial court in reviewing its former decree, on hearing a bill of review for alleged error of law apparent on the record, where the former decree recites that testimony was heard, has no jurisdiction to make a ruling on the effect of going to trial in the case under review without a reply on file. The effect of going to trial without a reply on file cannot be determined from an examination of the pleadings alone, but depends upon the proceed-

ings had and evidence heard upon the trial of the case under review, which is outside of the scope of review allowable either by the trial court reviewing its former decree or the Appellate Court or Supreme Court on appeal in such case.

Knaus v. *Chicago Title & Trust Co.*, 265 Ill. 588, 592-3.

Chap. 110, Par. 164 Ill. Practice Act, Bar Association Edition, 1943 (Specifically provides that the penalty of admission does not apply where "the party has had no opportunity to deny").

Rule 8 of the Illinois Supreme Court gives 20 days to answer and such time had not expired.

Piot v. *Davis*, 241 Ill. 434, 439 (Rule where case was heard on pleadings and evidence).

Dempsey v. *Burns*, 281 Ill. 644.

Kelly v. *Kelly*, 285 Ill. 72, 75.

Guerin v. *Guerin*, 270 Ill. 239, 244.

Imperial Fire Insurance Co. v. *Schimmer*, 96 Ill. 580.

VIII.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes "establishes a rule of property and not of procedure only" (Rec. 131).

Potter v. *Couch*, 141 U. S. 296, 312.

Spindle v. *Shreve*, 111 U. S. 542.

Baumgarten v. *Reconstruction Finance Corp.*, 131 F. (2d) 741.

Hummel v. *Cardwell*, 390 Ill. 526 (*the case at bar*).

Dunham v. *Kaufman*, 385 Ill. 79.

Nichols v. *Levy*, 72 U. S. (5 Wall.) 433.

Knight v. *Gregory*, 389 Ill. 554, 561.

Hull v. *Farmers Loan & Trust Co.*, 245 U. S. 312.

Eaton v. *Boston Safe Deposit & Trust Co.*, 240 U. S. 427.

IX.

The interests of the parties in the case at bar are of such a nature that the court of bankruptcy does not have summary jurisdiction and, therefore, the trustee in bankruptcy had his day in court when he filed his plenary suit in the Illinois court.

Cline v. *Kaplan,* 323 U. S. 97.

In re Baudouine, 101 Fed. 574 (2nd Cir. Ct. N. Y. 1900).

X.

Section 70a of the Bankruptcy Act does not define exemptions or property rights. By its express terms no substantive rights or special remedies are created in favor of the trustee in bankruptcy changing the character of the property which, by virtue of the express terms of an Illinois statute (not mere judicial decision regarding the common law), is not available to be taken in payment of a debt by any judicial process.

Hull v. *Farmers L. & T. Co.,* 245 U. S. 312.

Eaton v. *Boston Safe Deposit Co.,* 240 U. S. 427.

Potter v. *Couch,* 141 U. S. 296, 319.

Spindle, Assignee v. *Shreve,* 111 U. S. 542.

Southern Dairies, Inc. v. *Banks,* 92 F. (2d) 282 (certiorari denied 302 U. S. 761).

Steele v. *Buel,* 104 Fed. 968 (Cir. Ct. of App. 8th Circuit 1900).

Holden v. *Stratton,* 198 U. S. 202.

Turner v. *Bovee,* 92 F. (2d) 791, 792.

Lockwood v. *Exchange Bank,* 190 U. S. 294.

SUMMARY OF ARGUMENT.

1. The petitioner by his bill of review sought to attack collaterally, solely on the ground of alleged error of state law, two consent decrees (not subject to be reviewed by a bill of review), which had become *res adjudicata* more than 4 months prior to bankruptcy.

2. Whether the decrees sought to be attacked collaterally were consent decrees was a question of fact, and the finding of the state trial court, confirmed by the state Supreme Court, will not be reviewed by certiorari by this court.

3. Aside from the question of consent decrees, a bona fide agreement made for a valuable consideration respecting a subject matter in regard to which the parties were competent to contract, wherein the parties agreed to settle and compromise their litigation, fully executed more than 4 months prior to bankruptcy, estops both parties to such agreement, and the petitioner claiming through one party, from maintaining his bill of review.

4. A state court decree, which became *res adjudicata* more than 4 months prior to bankruptcy, is not affected by the provisions of Section 70a of the bankruptcy act in case where such decree is sought to be attacked by the petitioner solely on the ground that the court entering the decree committed an alleged error of state law.

5. No question of bankruptcy law was necessarily involved in the decision of the state Supreme Court, which construes the effect of a state statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) making the interest of a beneficiary in a trust created in good faith by another for the support of the beneficiary just as immune from the

claim of creditors as an interest in a so-called typical spendthrift trust.

6. There was no error of law committed by the trial court in entering the decrees sought to be attacked collaterally.

7. No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved.

8. No question of federal law or any important question of law is here involved.

ARGUMENT.

I.

A. A bill of review does not lie to set aside a consent decree which relates only to private rights between parties competent to contract, who acted with the advice of their respective attorneys in a case where such decree was entered more than four months before bankruptcy and is attacked solely on the ground that the trial court committed an error of law in entering such decree.

B. Consent that the decrees shall stand and be enforced, given by the defendant to the plaintiff for a valuable consideration, within term time, makes the decrees consent decrees, in regard to which under the Illinois law no bill of review will lie.

The petitioner contends that the interest of Dorothea W. Huszagh in the trust estate created by her father's will could be assigned by her and, therefore, her right, if she had any, to attack the consent decrees passed to the petitioner.

Upon the same premise that such interest could be assigned, such interest was a subject matter which both the Illinois trial court (Rec. 66, 98) and the Illinois Supreme Court in its opinion (Rec. 132) properly found was of such a character "that the agreement made between Mrs. Huszagh and Cardwell related to matters in which they were both competent to contract."

Upon the premise that Mrs. Huszagh could have assigned her beneficial interest in the trust estate, Mrs. Huszagh could make a bargain with Cardwell, which she did make, relating to her interest, providing that the decree for the sale of her interest stand and be carried out by a sale at public auction. If at such sale the interest brought

more than the amount due Cardwell on his judgment, the overplus would have been given to Mrs. Huszagh. The fact that at the public sale there was no overplus is immaterial. Cardwell agreed (Rec. 131-132), regardless of what price the interest brought at the master's sale, to satisfy in full his common law judgment entered against Mrs. Huszagh in another case, to pay master's fees, which he did, in the sum of $200.00 and all expenses and costs in the creditor's suit, and agreed to file a satisfaction piece in the common law suit.

In case where the parties are competent to contract respecting the subject matter of their agreement, a defendant who, for a valuable consideration, has agreed to take no steps to attack the validity of the decree, ceases to have the right to do so, and it makes no difference whether the decree is erroneous or even void for want of jurisdiction, because the defendant, nevertheless, is bound by his agreement not to attack its validity. (*Hempstead* v. *Broad*, 275 Ill. 358, 365; *Corwin* v. *Shoup*, 76 Ill. 246; *Bergman* v. *Rhodes*, 334 Ill. 137; *King* v. *King*, 215 Ill. 100.)

Since more than four months elapsed from the time of the entry of the consent decrees sought to be attacked collaterally and the advent of bankruptcy, the decrees sought to be attacked had become *res adjudicata* more than four months prior to bankruptcy. There is no provision in the bankruptcy act which gives the trustee in bankruptcy rights to attack and set aside decrees on the sole ground of a mistake of law which, according to the laws of the State of Illinois, have become *res adjudicata* between the parties more than four months prior to the advent of bankruptcy.

There is no question of fraud involved in this case (Rec. 87). The sole ground upon which the trustee in bankruptcy sought to attack the decrees by his bill of

review was on the ground of mistake of law (Rec. 27; 129), but a consent decree, entered more than four months prior to the advent of bankruptcy, cannot be set aside because of any error of law in entering such decree, either by a party to such decree or by his trustee in bankruptcy. (*Harding* v. *Harding*, 198 U. S. 317, citing *Armstrong* v. *Cooper*, 11 Ill. 540; *Crow* v. *Harrison*, 248 Ill. 462.)

A bill of review does not lie to set aside a consent decree on the ground of an error of law.

Petitioner contends in his petition that the sale held pursuant to the decrees entered in the creditor's bill suit transferred to Cardwell legal title to the beneficial interest of Mrs. Huszagh in the trust estate created by her father's will. The decree of the trial court ordering the sale in the creditor's suit, and the decree of the trial court in that suit approving the sale, the force and effect of the undisputed agreement made between Cardwell and Mrs. Huszagh, and the Master's public sale and assignment were effective for the purpose of transferring to Cardwell the interest of Mrs. Huszagh in the trust estate created by her father's will, because both the bill of review of the trustee in bankruptcy and the counterclaim for review of Mrs. Huszagh were dismissed for want of equity by the decree of the trial court in the bill of review suit, which was affirmed by the judgment of the state Supreme Court.

The transfer of Mrs. Huszagh's interest, however, was fully effectuated through the consent decrees entered ten months before the advent of bankruptcy, and such decrees, by virtue of the agreement between Cardwell and Mrs. Huszagh, were not subject to be set aside by a bill of review after having been entered. However, it appears that the trustee in bankruptcy makes the contention that because "title to Mrs. Huszagh's interest" passed to Cardwell by proceedings had in the creditor's bill suit, there

was a transfer of Mrs. Huszagh's beneficial interest in the trust within the purview of Section 70a(6) of the bankruptcy act relating to "the unlawful taking or detention of or injury to his property." To contend that a valid consent decree entered ten months before bankruptcy is an unlawful taking is a misnomer and begs the question. Such a contention concedes that in the creditor's suit the court had jurisdiction over the parties and the subject matter of its decree, as was found by both the trial court (Rec. 66) and by the state Supreme Court in its opinion (Rec. 132) otherwise there would be no "taking" as the petitioner alleges. The validity of a consent decree was confirmed by the judgment of the state Supreme Court. Its validity depended upon what was the law of the State of Illinois at the time the decrees sought to be attacked were entered and when Mrs. Huszagh made her agreement with Cardwell. At that time there was no bankruptcy, and no question of bankruptcy law was involved. Reviewing such decrees at a later date, more than four months after their entry, does not involve any proper question of bankruptcy law.

The state Supreme Court, construing Section 49 of the Illinois Chancery Act (Chap. 22 of the Illinois Revised Statutes 1945) relied upon by the plaintiff in his bill of review as sole ground for showing that there was an error of law in entering the decree in the creditor's suit, determinined only what was the proper construction of the state statute law at the time the consent decrees were entered. The state Supreme Court, in construing the Illinois statute relied upon, held that upon the facts in the case, as found by the trial court and confirmed by the state Supreme Court, no bill of review would lie. Such a determination of fact and state statute law is not subject to be reviewed by certiorari by this court. Whether such decrees should be set aside by a bill of review was solely a question of state law. If the decrees were subject to be

set aside by a bill of review although they were consent decrees and although Mrs. Huszagh made her agreement with Cardwell, then the Supreme Court would have provided in its judgment that relief be given to either the trustee in bankruptcy on his bill of review or to Mrs. Huszagh, on her counterclaim for review. Its actual decision in the case was that no bill of review would lie at the instance of Mrs. Huszagh or at the instance of the trustee in bankruptcy, and the rationale of the Supreme Court's decision was that the decrees sought to be attacked, being consent decrees, were at no time subject to be set aside by a bill of review on the ground of a mere error of law by Mrs. Huszagh. After the lapse of four months, the trustee in bankruptcy could claim only that the "rights" of Mrs. Huszagh "passed" to him. However, since Mrs. Huszagh had no right to maintain a bill of review, there was no right which "passed" to her trustee in bankruptcy on the advent of bankruptcy, irrespective of the fact whether Mrs. Huszagh's interest would have passed to the trustee in bankruptcy if there had been no creditor's bill proceedings and if there had been no agreement between her and Cardwell. Having decided in the negative the first question as to whether Mrs. Huszagh at any time had a right to maintain a bill of review to set aside a consent decree in the creditor's suit, because of an alleged error at law, the opinion of the Supreme Court of Illinois dealing with the second question, as to whether or not the trustee in bankruptcy would have had a right to maintain a bill of review to set aside the decrees in the creditor's suit if Mrs. Huszagh had not made the agreement she made with Cardwell, was a moot question not necessarily involved in this case and constituted mere dictum. By claiming that Mrs. Huszagh's "right" to maintain a bill of review "passed" to him by virtue of Section 70a(5) or 70a(6) of the bankruptcy act, the petitioner begs the question. He claims that he can set aside consent decrees

because a "right" to set them aside "passed" from a bankrupt by virtue of the bankruptcy act in case where at the advent of bankruptcy and more than four months prior thereto the bankrupt had no right to set aside the consent decrees for alleged error of law. This being the status of the attacked decrees more than four months before bankruptcy, there could not have been an unlawful taking within the meaning of Section 70a(6) of the bankruptcy act by virtue of a decree which was found and adjudicated by the Supreme Court of Illinois, at a time it had jurisdiction over the parties and the subject matter in the bill of review case, to be lawful and not subject to be set aside.

The provisions of Section 49 of Chapter 22 of the Illinois Revised Statutes were enacted as a matter of public policy for the benefit of a beneficiary in a trust estate but have never been construed to hold that in a creditor's bill, with the consent of the beneficiary, such property could not be sold to pay a debt. In the case of *Binns* v. *LaForge,* 191 Ill. 598, the Supreme Court affirmed a decree of the trial court which subjected the interest of a beneficiary in a trust, within the purview of the statute cited, to the payment of a debt, because the beneficiary did not take an appeal. The Illinois Supreme Court would not in the case last cited have affirmed the decree of the trial court if it were of the opinion that the trial court had no jurisdiction to enter the decree it did enter. When the Supreme Court affirms a decree of the trial court, it can no longer be contended that the trial court entering such decree did not have jurisdiction over the parties and the subject matter of its decree.

The trustee in bankruptcy, at various times, and even in his argument in the petition filed in this court, has tried to treat matters in the bill of review case as if he were trying the creditor's bill suit *de novo,* with a right

to interpose defenses on behalf of Mrs. Huszagh or on his own behalf, which were not interposed in the creditor's suit. He has purposely failed to mention in his summary statement of facts or argument the very salient and controlling feature of the state Supreme Court decision to the effect that the decrees sought to be attacked collaterally were consent decrees, and has not enlightened this court as to the controlling fact that Cardwell and Mrs. Huszagh, for a valuable consideration, made and entered into an agreement more than ten months before bankruptcy, wherein Mrs. Huszagh agreed not to litigate further, and, in particular, not to take any appeal or file any bill of review in respect to the decree of sale in the creditor's suit.

Contrary to the rules of this court, the petitioner has adopted the novel and unwarranted expediency of attaching as appendix to his petition, not a copy of the opinion of the Illinois Supreme Court but the second opinion of the Illinois Appellate Court, although his petition herein is not and could not be directed to the judgment of the Appellate Court, reversed, as it was, by the judgment of the Illinois Supreme Court.

II.

Whether the decrees in the creditor's suit sought to be attacked collaterally by a bill of review were consent decrees is a question of fact which will not be reviewed on certiorari by the Supreme Court of the United States.

The Circuit Court of Lake County, Illinois, found and adjudicated (Rec. 66-67) that the decrees sought to be attacked were consent decrees and that, for a valuable consideration, Mrs. Huszagh had agreed with Cardwell that she would not file any bill of review or take any further steps to litigate the validity of the decrees sought to be attacked by the trustee in bankruptcy. The bona fides of

such agreement is not in issue (Rec. 87) but is conceded in this case where the validity of the decrees is sought to be attacked collaterally only on the ground of an error of law (Rec. 27-29; 129). Whether the decrees were consent decrees is a matter of fact, and the finding of the trial court, concurred in by the Supreme Court of Illinois, makes such fact final, because the Supreme Court of the United States does not grant a writ of certiorari for the purpose of inquiring into the weight of the evidence and discussing specific facts. (*Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139.) Furthermore, the evidence in the bill of review case (Rec. 81-89), showing that the decrees were consent decrees is undisputed.

III.

Section 70a of the Bankruptcy Act does not define exemptions or create property rights in derogation of the express terms of the Illinois statute (Section 49 of Chapter 22 of the Illinois Revised Statutes) pertaining to the interest of a beneficiary in a trust estate created in good faith for support of someone other than the beneficiary.

It is the contention of the trustee in bankruptcy that even in the absence of fraud or mistake of fact, he has some special standing and privilege in a plenary bill of review suit in a court of Illinois to attack decrees which became *res adjudicata* more than four months prior to bankruptcy, which the bankrupt would not have if bankruptcy had not intervened. There is no language in Section 70a of the bankruptcy act which could be construed to create such special remedy or discrimination in favor of a trustee in bankruptcy.

The Supreme Court of Illinois was right in holding, as a matter of *obiter dicta* that in a plenary suit a trustee in bankruptcy has no right to take an interest in property which, by virtue of an express statute (Section 49 of

Chapter 22) of the State of Illinois, as construed by not only the Supreme Court of that state but as repeatedly construed by the Supreme Court of the United States, creates a rule of property and renders property of the specific character falling within the purview of the statute immune from claims of all creditors. Property so immune from claims of all creditors would not have passed to the trustee in bankruptcy if there had not been any proceedings in the creditor's bill suit. This holding by the Illinois Supreme Court was not necessary to its decision, which rested solely, as appears from the dismissal of Mrs. Huszagh's counterclaim for review, upon the ground that the decrees were consent decrees entered more than four months prior to bankruptcy.

The dictum of the Supreme Court to the effect that the trustee in bankruptcy had no right to recover and administer as a part of the assets of the bankrupt's estate any portion of the principal or income from the trust estate created by the last will of Mrs. Huszagh's father, was not the basis of its judgment.

However, the dictum of the Illinois Supreme Court was based upon its own construction of Section 49 of Chapter 22 of the Illinois Revised Statutes, which must be regarded as if it were read into every trust made since the passage of that statute in 1845. Such statute gives a particular character to the interest of a beneficiary in a trust estate, that is within the purview of Section 49 of Chapter 22 of the Illinois Revised Statutes, also known as Section 49 of the Illinois Chancery Act, and creates a rule of property. (*Potter* v. *Couch*, 141 U. S. 296, 312.) Such interest is as immune from the beneficiary's debts as is an interest in a typical spendthrift trust.

In the case of *Steib* v. *Whitehead*, 111 Ill. 247, where the interest of a beneficiary in a typical spendthrift trust was involved, the Supreme Court of Illinois held that funds

in the hands of the trustee could not be attached by creditors.

In the case of *Knight* v. *Gregory,* 389 Ill. 554, at page 561 of its opinion, the Illinois Supreme Court stated:

> "In view of section 49 of the Chancery Act, however, all active trusts, which otherwise qualify, come under the doctrine of *Steib* v. *Whitehead,* 111 Ill. 247. With these authorities and others of a similar nature cited by appellants we agree. These authorities are, however, concerned only with an interpretation of the rights of creditors seeking redress against funds in the hands of a trustee under either a spendthrift trust or an active trust qualifying under Section 49 of the Chancery Act."

In *Potter* v. *Couch,* 141 U. S. 296, at page 320 of its opinion, the Supreme Court of the United States in speaking of the Illinois statute stated:

> "the spirit of the statute alike require that this equitable interest should not be charged for his debts."

and that the Illinois statute

> "establishes a rule of property, and not of procedure only."

In *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company,* 240 U. S. 427, the court had under consideration a trust established by a will, in which will it was provided that the income shall be free from interference of creditors. In Illinois, Section 49 of Chapter 22 of the Illinois Revised Statutes, had been in force and effect in its present form since the year 1845, and it has repeatedly been construed as creating a rule of property. Every will creating a trust, bona fidely created by one person for the benefit of another, must be read to the same extent and in like manner as if specific reference to the statute mentioned had been made in the will. With this fact in mind, the case at bar, as far as the contentions of the

petitioner are concerned, is similar to the case of *Eaton, Trustee in Bankruptcy* v. *Boston Safe Deposit and Trust Company*, 240 U. S. 427, in which the Supreme Court stated in its opinion:

> "The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it."

Since the petitioner contends that he was entitled to maintain his bill of review only because of the force and effect of Section 49 of Chapter 22 of the Illinois Revised Statutes, he must be bound by the construction placed on that statute by the Supreme Court of Illinois. The United States Supreme Court will follow the decisions of the Illinois Supreme Court construing an Illinois statute. In the case of *Page* v. *Edmunds*, 187 U. S. 596, at page 602, the United States Supreme Court stated:

> "If those decisions are interpretations of the state statute, we must yield to their authority."

No question of any conflict between any Illinois statute and the bankruptcy act, or any question of due process of law, is involved. No question of federal law or any important question of law is here involved.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this is not a proper case for review by certiorari and that the petition for such writ should be denied.

Respectfully submitted,

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